

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

) **File No. BPH-911115MG**

)

GARY E. WILLSON

) **File No. BPH-911115MO**

)

For a Construction Permit

)

New FM Station on Channel 265A

)

in Calistoga, California

)

RECEIVED

NOV 28 1995

**TO: The Honorable Edward Luton
Administrative Law Judge**

DOCKET FILE COPY ORIGINAL
**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT

Gary E. Willson (Wilson) and Moonbeam, Inc. (Moonbeam), by their respective attorneys, pursuant to Section 73.3525 of the Commission's Rules and *Public Notice*, FCC 95-291 (released September 15, 1995), hereby jointly request the Presiding Administrative Law Judge to simultaneously: (a) approve the Settlement Agreement attached to this Joint Petition; (b) dismiss the application of Willson (File No. BPH-911115MO), such dismissal subject to final approval of this Settlement Agreement; and (c) grant the Moonbeam application (File No. BPH-911115MG). "Final approval" means an action no longer subject to timely appeal or judicial or administrative review or reconsideration.

Willson and Moonbeam have entered into a Settlement Agreement whereby Willson will dismiss his application in exchange for certain compensation. Attached to this Joint Request is the Settlement Agreement. Under the Settlement Agreement, the mutual exclusivity between the applications is resolved, and the Moonbeam application may be granted without recourse to the FCC's comparative hearing processes.


No. of Copies rec'd 026
List ABCDE

Also attached are the Declarations of Willson and Mary Constant, Moonbeam's sole shareholder, as required by Section 73.3525(a) of the Commission's rules. The declarations state the Settlement Agreement is in the public interest since it will conserve the resources of the FCC and will facilitate commencement of local FM broadcast service at Calistoga, California. The Declarations also state that neither application was filed for the purpose of reaching or carrying out this settlement, and certify that the dismissing applicant has not and will not receive any consideration in excess of that stated in the Settlement Agreement. Since each of the applicants propose a facility to be licensed to Calistoga, California, the provisions of Section 73.3525(b) with respect to Section 307(b) of the Communications Act of 1934, as amended, do not apply.

Accordingly, Willson and Moonbeam respectfully submit that they have satisfied the requirements of Section 73.3525 of the Commission's rules, as partially waived by *Public Notice*, FCC 95-391 (released September 15, 1995). Willson and Moonbeam request that the Settlement Agreement be approved, that the Moonbeam application be granted, and that the application of Willson be dismissed subject to final approval of the Settlement Agreement.

Respectfully submitted,

GARY E. WILLSON

By 
A. Wray Fitch III
His Attorney

GAMMON & GRANGE, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, VA 22102-3807
(703) 761-5000

MOONBEAM, INC.

By Lee W. Shubert / awf
Lee W. Shubert
Its Counsel

HALEY BADER & POTTS
4350 North Fairfax Drive
Suite 900
Arlington, VA 22203-1633
(703) 841-0606

November 28, 1995

[K:\0068\JT_REQ.AWF]

SETTLEMENT AGREEMENT

This Agreement is made this _____ day of November, 1995, between Gary E. Willson (hereafter "Willson"), and Moonbeam, Inc. (hereafter "Moonbeam").

WITNESSETH:

WHEREAS, Willson has filed with the Commission an application for a construction permit for a new commercial FM broadcast station to be licensed to Calistoga, California (File No. BPH-911115MO); and

WHEREAS, Moonbeam has also filed with the Commission an application for a construction permit for a new commercial FM broadcast station to be licensed to Calistoga, California (File No. BPH-911115MG); and

WHEREAS, the applications are mutually exclusive and only one can be granted, requiring the Federal Communications Commission (hereafter "the Commission") to determine through a trial-type hearing process which of the applications should be granted; and

WHEREAS, Willson is willing to dismiss his application in return for consideration and Moonbeam is willing to furnish that consideration in order to obtain a grant of its application; and

WHEREAS, the parties believe that the public interest would be served if the mutual exclusivity of their applications is resolved because such resolution would conserve the resources of both the Commission and the parties, and hasten inauguration of a first local aural service to Calistoga;

NOW, THEREFORE, in consideration of the foregoing and of the terms and conditions set out below, and with the intention of being legally bound hereby, the parties agree to the following:

1. Covenants by Moonbeam. In exchange for the covenants of Willson herein, and contingent on a grant of Moonbeam's application, and approval of this Agreement, Moonbeam will pay to Willson by certified or cashiers check or by wire transfer the sum of **Two Hundred Seventy-Five Thousand Dollars (\$275,000)** payable to the order of Gary E. Willson. This sum shall be payable ten (10) business days after the release day of the Commission's Order approving the Settlement Agreement and granting Moonbeam's application.

2. Closing. Ten (10) business days after the release date of the Commission's Order approving the Settlement Agreement and granting Moonbeam's application, Moonbeam will pay Willson, as provided in Paragraph 1, **Two Hundred Seventy-Five Thousand Dollars (\$275,000)**. In the event such payment is not timely made, Mary F. Constant and Fred Constant agree to deliver to Mr. Willson a Promissory Note, in the form attached as Exhibit 1, in the amount of **Three Hundred Thousand Dollars (\$300,000)**. The Note is to be secured by a second mortgage on the Constant's personal residence in Calistoga, California, as more particularly described in Exhibits 1 and 2 and is to be personally guaranteed by Fred and Mary Constant. In the event that neither the payment as provided herein is made, nor the Promissory Note to be secured as provided in this paragraph is timely delivered, Willson may at his option request that the construction permit for the Calistoga station (or Moonbeam's interest in the station) be assigned to Willson, subject to FCC approval as required by FCC rules. On such written request by Willson, Moonbeam agrees to immediately assign its rights to the Calistoga station to Willson. On consummation of such assignment to Willson, Moonbeam's obligations hereunder shall be satisfied. Moonbeam and Mary Constant agree to execute all documentation necessary to effect such assignment.

3. Reinstatement of Application. In the event Moonbeam fails to timely make the payment as provided in Paragraph 2 or deliver the Promissory Note, properly secured as also provided in Paragraph 2, Willson may, in his sole discretion, seek reinstatement of his application. If Willson's application is reinstated, Moonbeam shall have no liability or further obligation to Willson.

4. Joint Request for Approval of Settlement Agreement. Within the period prescribed by the Commission's rules, the parties shall jointly request in writing ("Joint Request") that the Commission do all of the following:

- (a) approve the terms of Settlement Agreement;
- (b) grant the Moonbeam application; and
- (c) dismiss Willson's application, such dismissal to become effective only upon finality of approval of the Settlement Agreement.

The parties shall promptly cause the preparation of all documentation necessary to properly support this Joint Request. Each party shall fully cooperate with the other and the Commission by expeditiously and completely providing the other or the Commission with any additional information reasonably requested. Neither party shall take any action designed to, or which might, cause denial of approval of the Settlement Agreement. Should the Commission or its delegatee refuse to approve the Settlement Agreement, the parties shall examine the objections of the Commission and promptly make individual and joint good faith efforts to resolve all objections in order that the Settlement Agreement may be resubmitted to the Commission for approval.

5. Covenants by Willson and Termination. Willson agrees to request dismissal of the Willson application contingent on final approval of the Settlement Agreement. Final approval means an order that is no longer subject to timely Commission or judicial reconsideration or review. In the

event any objection or petition to deny is filed against this Settlement Agreement or grant of a construction permit to Moonbeam, then Willson shall have the option to terminate this Agreement and his application will be returned to *status quo ante*.

6. Special Issues Designated Against Moonbeam. The parties understand and acknowledge that financial and misrepresentation issues have been added against Moonbeam in this proceeding. The parties agree that, in the event the issues are not resolved in favor of Moonbeam, the instant Settlement Agreement shall terminate and be of no further force and effect and the application of Willson shall be returned to *status quo ante*.

7. Remedies on Default. In the event that either party is in default in the performance of the terms of this Agreement, the other party shall have available to it all remedies to which it is entitled under California law or equity including, but not limited to, injunctive relief or specific performance. In the event of a default by either party, the defaulting party will pay the reasonable attorney's fees incurred by the other party in prosecuting a suit for enforcement of this Agreement. In addition, in the event of a default by Moonbeam, interest shall accrue on any unpaid sum due at the rate of 15% per annum commencing from the date said sum was due until paid.

8. Integration. This Agreement and other Agreements incorporated herein contain the entire understanding of the parties with respect to the subject matter, and supersede all previous oral or written agreements or understandings. This Agreement may be amended only by a written document executed by both parties.

9. Counterpart Signatures. This Agreement may be executed by the parties in counterpart with the same effect as if the signatures to both counterpart pages were the same copy of the Agreement.

10. Construction. This Agreement shall be governed and construed under the laws of California and the rules, regulations and policies of the Commission.

11. Assignment. This Agreement shall be binding and shall inure to the benefit of the parties hereto. Neither Moonbeam or Willson may assign or transfer their respective rights herein.

12. Notices. Any notices or other communication shall be in writing unless otherwise stated, and shall be considered to have been duly given when deposited into United States certified mail, postage paid, return receipt requested, as follows:

(a) If to Moonbeam, to: Mary Constant
2121 Diamond Mountain Road
Calistoga, CA 94515

With a copy to: Lee W. Shubert, Esq.
Haley, Bader & Potts
4350 N. Fairfax Drive, Suite 900
Arlington, VA 22203-1633

(b) If to Willson, to: Gary E. Willson
2 Corte del Bayo
Larkspur, CA 94939

With a copy to: A. Wray Fitch III, Esq.
Gammon & Grange
8280 Greensboro Drive, 7th Floor
McLean, VA 22102

13. Good Faith. Moonbeam represents and warrants that it is legally, technically, financially and otherwise qualified to obtain a construction permit from the FCC for a new FM station at Calistoga, California and that it does not know of any facts which would disqualify it under the Commissions Act of 1934, as amended, from owning and operating a radio station, except as noted in Paragraph 6. Moonbeam further warrants and represents that, should any such fact come to its attention, it will promptly notify Willson and use its best efforts to attempt to remove such disqualification. Moonbeam further represents and warrants that it will continue to prosecute its

Calistoga, California application in good faith and will seek prompt issuance of a grant of its application by the FCC and the subsequent issuance of the construction permit.

14. Authority. Each party represents that it has full legal authority to enter into and perform its obligations under this Agreement.

15. Captions. The captions of the various paragraphs of this Agreement have been inserted only for the purpose of convenience; such captions are not a part of this Agreement and shall not be deemed in any manner to modify, explain, enlarge or restrict any of the provisions of this Agreement.

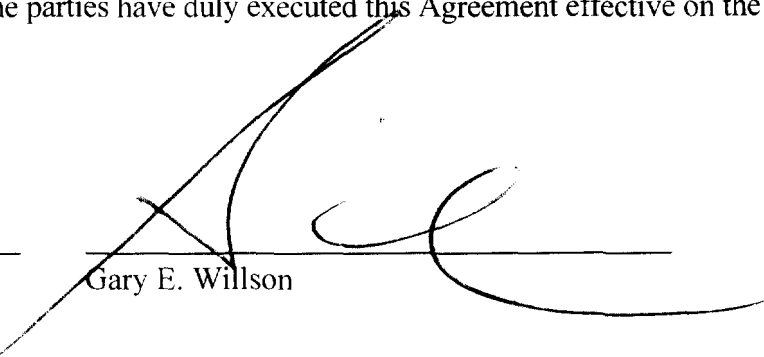
16. Time is of the Essence. Time is of the essence.

17. Exhibits. All Exhibits are incorporated by reference and any Exhibit referenced in this Settlement Agreement which is not attached at the time the Settlement Agreement is filed with the FCC shall be prepared and included as an amendment to this Agreement within five (5) business days of the date the Settlement Agreement is filed with the FCC. In the event the parties do not timely agree to the text of the Exhibits, either party may terminate this Settlement Agreement without further objection.

18. Willson's Transmitter Site. Willson hereby authorizes Moonbeam to use and incorporate in Moonbeam's application the engineering portion of Willson's application (File No. BPH-911115MO). Moonbeam acknowledges that Willson is not the owner or agent of his proposed transmitter and tower site. Any arrangements for use of the site must be made by Moonbeam with the site owner or agent. If this Agreement is not approved or is terminated Moonbeam may not use Willson's transmitter and tower site, if such use interferes with Willson's use of the site or in any way forecloses Willson from using the site.

IN WITNESS WHEREOF, the parties have duly executed this Agreement effective on the date mentioned above.

11-20-95
Date



Gary E. Willson

Date

Mary F. Constant
President, Moonbeam, Inc.

Attest

Date

Fred Constant, Individually

Date

Mary F. Constant, Individually

1
IN WITNESS WHEREOF, the parties have duly executed this Agreement effective on the
date mentioned above.

Date

11.20.95

Date

Gary E. Willson

Mary F. Constant

Mary F. Constant
President, Moonbeam, Inc.

Attest

11.20.95

Date

Fred Constant

Fred Constant, Individually

11.20.95

Date

Mary F. Constant

Mary F. Constant, Individually

[K:\0066\SETTLE.AWF]

EXHIBIT 1

Promissory Note or Deed of Trust Note

Note in the amount of \$300,000 payable to Mr. Willson is to be secured by a second mortgage on Fred and Mary Constant's personal residence in Calistoga, California and personally guaranteed by Fred and Mary Constant. The property will be subject to no superior mortgages or encumbrances other than an existing mortgage. Fred and Mary Constant shall warrant to Mr. Willson the existence and amount limits of the existing mortgage. The Note will provide for quarterly payments to be paid in equal installments, including principal and interest, over seven years. Interest shall accrue at the rate of 10 percent per annum or 2 points over prime, whichever is higher. The Note, the document providing a second mortgage, and the personal guarantees, are to be executed and held in escrow by Haley, Bader & Potts, pursuant to an Escrow Agreement. These documents are to be drafted as provided in Paragraph 17, provided, however, the parties may agree to extend the time to prepare and deliver these documents, but any such extension will not serve as a basis for waiver of any other provision in the Agreement.

EXHIBIT 2

Description of Fred and Mary F. Constant's personal residence (Vineyard) in Calistoga, California. To be provided.

DECLARATION

I, Gary E. Willson, state under penalty of perjury that the following is true and correct to the best of my personal knowledge and belief:

1. I am an applicant for a new FM station on Channel 265A at Calistoga, California (File No. BPH-911115MO).

2. I have entered into an agreement with Moonbeam, Inc., a competing applicant for authority to construct a mutually exclusive facility. The Settlement Agreement proposes the dismissal of my application in exchange for the stated compensation. The Settlement Agreement is the only agreement between the parties and, except as set forth in the Settlement Agreement, no consideration is being paid or promised to me for the dismissal of my application.

3. It is believed that the approval of this Settlement Agreement is in the public interest since it would conserve the resources of the Commission and would expedite implementation of FM service at Calistoga, California.

4. My application was not filed for the purpose of reaching or carrying out a settlement with Moonbeam, Inc.

Executed under penalty of perjury this 26th day of November 1995.



Gary E. Willson

DECLARATION

I, Mary F. Constant, state under penalty of perjury that the following is true and correct to the best of my personal knowledge and belief:

1. I am the President and sole shareholder of Moonbeam, Inc., an applicant for a new FM station on Channel 265A at Calistoga, California (File No. BPH-911115MG).

2. I have entered into a settlement agreement with Gary E. Willson, a competing applicant for authority to construct a mutually exclusive facility. The Settlement Agreement proposes the dismissal of Mr. Willson's application in exchange for payment of certain consideration. The Settlement Agreement is the only agreement between the parties and, except as set forth in the Settlement Agreement, no consideration is being paid or promised to Mr. Willson for the dismissal of his application.

3. It is believed that the approval of this Settlement Agreement is in the public interest since it would conserve the resources of the Commission and would expedite implementation of FM service at Calistoga, California.

4. My application was not filed for the purpose of reaching or carrying out a settlement agreement.

Executed under penalty of perjury this 20 day of November 1995.



Mary F. Constant, President
Moonbeam, Inc.

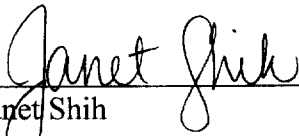
CERTIFICATE OF SERVICE

I, Janet Shih, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent this 28th day of November 1995, by first-class, postage prepaid, U.S. Mail, copies of the foregoing JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT to the following:

* The Honorable Edward Luton
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 225
Washington, D.C. 20554

Robert A. Zauner, Esq.
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, D.C. 20554

Lee W. Shubert, Esq.
Haley Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, VA 22203-1633
(Counsel for Moonbeam, Inc.)



Janet Shih

* By Hand